

**BEFORE THE  
ILLINOIS COMMERCE COMMISSION**

Access One, Inc.; )  
ACN Communications Services, Inc.; )  
Allegiance Telecom of Illinois, Inc.; )  
Bullseye Telecom, Inc.; )  
CIMCO Communications, Inc.; )  
CoreComm Illinois, Inc. )  
DSLnet Communications, LLC; )  
Focal Communications Corporation of Illinois; )  
Forte Communications, Inc.; )  
Globalcom, Inc.; )  
Mpower Communications Corp. )  
d/b/a Mpower Communications of Illinois; )  
RCN Telecom Services of Illinois, LLC; )  
and XO Illinois, Inc. )

vs.

Docket No. \_\_\_\_\_

**Illinois Bell Telephone Company d/b/a SBC Illinois**

**IN THE MATTER OF A COMPLAINT )  
AND PETITION FOR AN )  
EXPEDITED ORDER THAT SBC )  
REMAINS REQUIRED TO PROVISION )  
UNBUNDLED NETWORK ELEMENTS )  
ON EXISTING RATES AND TERMS )  
PENDING THE EFFECTIVE DATE )  
OF AMENDMENTS TO THE )  
PARTIES' INTERCONNECTION )  
AGREEMENTS PURSUANT TO )  
220 ILCS 5/10-101 AND 10-108 )**

**COMPLAINT AND PETITION OF THE  
COMPETITIVE CARRIER COALITION  
FOR EXPEDITED RELIEF**

Access One, Inc.; ACN Communications Services, Inc.; Allegiance Telecom of Illinois,  
Inc.; Bullseye Telecom, Inc.; CIMCO Communications, Inc.; CoreComm Illinois, Inc.; DSLnet  
Communications, LLC; Focal Communications Corporation of Illinois; Forte Communications,  
Inc.; Globalcom, Inc.; Mpower Communications Corp. d/b/a Mpower Communications of

Illinois; RCN Telecom Services of Illinois, LLC; and XO Illinois, Inc. (collectively the “Competitive Carrier Coalition” or “Coalition”) hereby file this Complaint against Illinois Bell Telephone Company d/b/a SBC Illinois (“SBC”), pursuant to Sections 10-101 and 10-108 of the Illinois Public Utilities Act (“PUA” or “Act”) and petition the Commission for an order clarifying that, if the D.C. Circuit’s decision in *USTA II*<sup>1</sup> becomes effective on or after June 15, 2004, SBC would remain obligated to provide unbundled loops, transport, and switching network elements on existing rates and terms unless and until amendments to SBC’s interconnection agreements and its UNE tariff that alter such obligations are approved by the Commission.

At this time, the *USTA II* stay is currently scheduled to be lifted on June 15. If the Commission elects not to issue a decision before that date, it should provide interim clarification that SBC may not alter its provision of UNEs pending the Commission’s consideration of this Petition.

This Complaint should not have been necessary, because SBC remains obligated to provide UNEs under its interconnection agreements and tariff, Section 251 of the Act, Section 13-801 of the Illinois Public Utilities Act (“PUA”), and the *SBC/Ameritech Merger Conditions* even if the FCC implementing rules are vacated. However, SBC has refused requests to confirm that it will not – unilaterally and unlawfully – alter or discontinue their provision of unbundled

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<sup>1</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). As the Commission is aware, the D.C. Circuit’s March 2, 2004 decision would vacate and remand the FCC’s unbundling rules for transport and local switching. The Court has twice stayed its mandate, most recently through June 15, 2004. On May 24, 2004, the FCC and CLECs filed motions with the Court for an extension of this stay pending the filing of petitions for *certiorari* with the United States Supreme Court.

high-capacity loops,<sup>2</sup> transport and switching at TELRIC based rates if *USTA II* becomes effective. Unilateral changes to the rates, terms and procedures for UNE access would, at a minimum, create tremendous uncertainty regarding a CLEC's ability to serve existing and new end user customers.

As demonstrated below, CLECs have substantial arguments that SBC will remain obligated by law to provide these UNEs even if the FCC rules are vacated. The legal impact of the Court's decision should be the subject of contract amendments negotiated by CLECs and SBC. If CLECs and SBC are unable to reach an agreement on those contract amendments, then this Commission will need to arbitrate those amendments. SBC should not, however, be able to impose its view by fiat. Therefore, the requested order is urgently needed to preserve the *status quo* and to protect Illinois consumers and competitors from the threat of arbitrary and premature imposition of service and market disruption by SBC. A Commission Order maintaining this *status quo* harms no party to this proceeding but prevents irreparable harm to CLECs caused by unilateral action by SBC.

## **I. JURISDICTION**

Pursuant to Section 4-101 of the PUA, this Commission has the authority to supervise all public utilities, including telecommunications carriers, and to monitor their compliance with the

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<sup>2</sup> Although the D.C. Circuit's opinion would only vacate the FCC's rules for unbundled local switching and dedicated transport network elements, SBC has suggested, erroneously, that *USTA II* would also vacate the rules for high-capacity loops. The Coalition emphatically rejects this mischaracterization, but includes loops within the scope of this Complaint to preclude any doubt as to SBC's ongoing obligation to provide unbundled loops even if *USTA II* becomes effective. *See USTA II* at 594 (vacating only transport and switching rules).

PUA, any other law, and the orders of the Commission.<sup>3</sup> The Commission has the power to hold hearings concerning any matters covered by the PUA.<sup>4</sup>

## **II. THE *USTA II* ORDER, EVEN IF IT BECOMES EFFECTIVE, WOULD NOT IMMEDIATELY ALTER SBC'S STATUTORY, CONTRACTUAL AND TARIFF OBLIGATIONS**

The D.C. Circuit's decision in *USTA II* to vacate the FCC's transport and switching unbundling rules represents only the latest, and certainly not the last, chapter in the ongoing attempt to implement the Telecommunications Act of 1996. Even if that decision becomes effective, it will not have any immediate effect on SBC's statutory, contractual and state tariff obligations to provide unbundled network elements.

*USTA II* does not declare unlawful any UNEs or establish any limitations that would preclude the FCC from adopting new rules that restore all of the vacated transport and switching UNEs. Despite the ILECs' request for a Court order that would have allowed them to stop provisioning UNEs if the FCC rules were vacated and not replaced with new unbundling rules,<sup>5</sup> the Court declined to grant such relief.<sup>6</sup> *USTA II* would merely remand the case to the FCC to make new unbundling determinations for transport and switching, which could be as extensive as those that were vacated.<sup>7</sup> In the interim, any attempt to "implement" the temporary absence of

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<sup>3</sup> 220 ILCS 5/4-101.

<sup>4</sup> 220 ILCS 5/10-101; 220 ILCS 5/10-108.

<sup>5</sup> *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Verizon's Petition For Writ of Mandamus To Enforce the Mandate of This Court (August 28, 2003), at 30.

<sup>6</sup> At oral argument, Judge Williams responded that "we don't have the authority to do that, only the FCC can do that." *USTA II*, Transcript of Oral Argument, January 28, 2004, at 7-11.

<sup>7</sup> On remand, the FCC and states through Section 252 proceedings, will remain obligated by Congressional mandate to ensure UNE access where CLECs would suffer impairment without such access. As demonstrated in Exhibit 1, it is beyond dispute that CLECs are impaired in at least some cases without access to transport, loops and switching. Therefore, any new lawful UNE rules would include many, if not all, of the UNEs that were covered by the vacated rules.

FCC unbundling rules would therefore result in unnecessary market disruption and would waste the resources of carriers and the Commission.

Moreover, SBC remains legally required under its existing interconnection agreements and Commission approved tariff to provide UNEs during the interim period before new rules are established. It is undisputed that, as of today, these contracts and tariff require SBC to provide unbundled transport, loops and switching at TELRIC rates. In the past, SBC has recognized that pursuant to Section 252, any changes to their interconnection agreements warranted by an alleged change of law can only be implemented through bilateral amendments to the parties' interconnection agreements, which are negotiated or if necessary arbitrated. SBC's Illinois UNE tariff, meanwhile, can only be amended with Commission approval.

As recently as the oral argument of *USTA II* before the D.C. Circuit, SBC explicitly recognized their obligation to provide existing UNEs until new rules were implemented through contract amendments. Judge Edwards asked SBC's counsel, Mr. Kellogg, what remedy the court could provide if it agreed to vacate the FCC's rules:

Mr. Kellogg [counsel for SBC and the other ILEC parties]: The remedy is to remand to the FCC ... and to direct the Commission to do what Congress and the courts told them to do, which is to make an impairment determination.

Judge Edwards: Where does that leave your clients, in your view, with respect to the precise matters that are at issue? ... [D]o they remain in limbo? That is, do they remain as they are now? Do you assume impairment, no impairment, what? What are you imagining?

Mr. Kellogg: Well, it's a difficult question, Your Honor, because --

Judge Edwards: That's why I'm raising it.

Mr. Kellogg: -- we are subject, *we are subject to a number of agreements in the states, and the states will continue to require us to provide elements pursuant to those agreements.*

Judge Edwards: Right.<sup>8</sup>

Thus, SBC conceded to the Court that it must continue to provision UNEs under its existing interconnection agreements until the FCC issues new rules based on new impairment or non-impairment findings. June 15<sup>th</sup> would be, at most, a date like October 2, 2003, which was the day the *TRO* became effective. On that day, the ILECs did not make immediate changes to their UNE provisioning practices. Instead, they delivered letters to CLECs requesting the initiation of negotiations of contract amendments. If SBC wishes to send such letters if *USTA II* becomes effective on June 15, or propose changes to its UNE tariff, it has the right to do so.<sup>9</sup> However, nothing more should occur on that date, and SBC would remain obligated to continue to provision UNEs pending the execution of any contract amendment.

**III. STATE ACTION IS NEEDED TO PROTECT CONSUMERS AND COMPETITION FROM SBC'S THREAT TO DISRUPT ITS PROVISION OF UNES UNILATERALLY AND PREMATURELY.**

As demonstrated above, changes to the federal unbundling regime are implemented through contract amendments. Thus, after the *Local Competition* and *UNE Remand* rules were vacated, SBC recognized that changes to its UNE provisioning would only occur after new rules were adopted and then implemented through contract amendments.<sup>10</sup> After *USTA II*, however,

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<sup>8</sup> *USTA II*, Transcript of Oral Argument, January 28, 2004, at 7-11 (emphasis added).

<sup>9</sup> The Coalition does not concede that a change of law would occur upon the issuance of the mandate in *USTA II*, for the reasons set forth in Exhibit 1. However, if SBC disagrees, it could properly use the Section 252 process to seek a binding determination as to whether the contracts must be modified.

<sup>10</sup> See Common Carrier Bureau Establishes Rapid-Response System to Minimize Disputes Arising From Supreme Court's Iowa Utilities Board Order, Public Notice, 14 FCC Rcd 4061 (1999) (citing letters from Bell companies and GTE stating the carriers' willingness to maintain the status quo regarding unbundled access following the Supreme Court's vacatur of the unbundling rules). Similarly, after *USTA I* vacated the *UNE Remand* Order, SBC and the other Bell companies supported a stay of the mandate through February 20, 2003 (9 months after the issuance of the decision) to provide the FCC with sufficient time to adopt replacement rules in the Triennial Review proceeding. See *USTA I*, Nos. 00-1012, 00-1015, Motion for Stay, (D.C. Cir. Dec. 23, 2002).

SBC indicated to CLECs that it would no longer be required to make high-capacity loops and transport available as UNEs pursuant to Section 251(c) as soon as the *USTA II* mandate issues.<sup>11</sup> SBC's position appears to be that no contract amendments are needed to withdraw these UNEs because the existing agreements allow SBC to make these changes unilaterally, notwithstanding the CLEC's good faith argument that no change is warranted. For example, SBC argued in Michigan that no commission action is needed now to preserve the *status quo* because SBC will adhere to its interconnection agreements after June 15.<sup>12</sup> However, there is no agreement among the parties as to what "adherence" means – as noted above, SBC believes that its obligations would cease immediately, while the Coalition members believe, as explained below, that SBC's obligations would remain in effect. Therefore, SBC's promise to honor its interconnection agreements, when coupled with assertions that would violate the same agreements, have done nothing to lift the uncertainty that faces the competitive market if *USTA II* takes effect on June 15.

Individual members of the Coalition, concerned by SBC's equivocations, sought assurance that SBC would comply with its legal obligations to continue to provide UNEs in

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<sup>11</sup> *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Motion of the Federal Communications Commission to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari (May 24, 2004) at Attachment C (Letter from Gary L. Phillips, General Attorney & Assistant General Counsel, SBC Telecommunications, Inc., to Steven A. Augustino, Esq. (May 19, 2004)).

<sup>12</sup> *In re Request for Declaratory Ruling, or in the Alternative, Complaint against Michigan Bell Telephone Company d/b/a SBC Michigan, Verizon North, Inc., and Contel of the South Inc. d/b/a Verizon North Systems for an Order Requiring Compliance with the Terms and Conditions of Interconnection Agreements*, MPSC Case No. U-14139, SBC Michigan's Response in Opposition to Complainants' Request for Emergency Relief Order (May 25, 2004). In response to a letter requesting assurances regarding the provision of DS1, DS3, and dark fiber loop and transport facilities as UNEs in accordance with SBC Illinois' interconnection agreement with Globalcom, Inc. and relevant SBC Illinois tariffs, SBC similarly failed to explain adequately *how* it will honor its interconnection agreement and tariff obligations or how it will proceed with amending such agreements and tariffs. Letter from Paul E. Dorin, General Attorney, SBC Telecommunications, Inc., to Patrick J. Donovan and Philip J. Macres, Swidler Berlin Shereff Friedman, LLP (May 27, 2004).

Illinois, as it had after the *Local Competition* and *UNE Remand Orders* were vacated. SBC, to date, has refused to provide such assurance.

The Coalition does not, as SBC may argue, seek to override the “change of law” terms of existing interconnection agreements. Even if SBC did have the right under existing agreements to cease providing a UNE where its obligation to do so indisputably has been terminated, no contract can reasonably be read in the context of Section 251 to permit SBC to unilaterally terminate a UNE where the CLEC has a good faith position that the UNE remains required under federal or state law. SBC has no more right unilaterally to change the contracts than do CLECs. If each party were permitted to execute unilateral changes to their interconnection agreements based upon disputed opinions of the meaning of a new event, each party’s dueling unilateral changes would quickly render the contract incoherent.

For this reason, the *Triennial Review Order* (“TRO”) reaffirmed that the contract amendment process – and not unilateral action – must be used to implement its provisions. The FCC found that “to the extent our decision in this Order changes carriers’ obligations under section 251, we decline the request of several BOCs [including SBC] that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions.”<sup>13</sup> The FCC concluded that the contract amendment process “is the very essence of section 251 and section 252” of the Act, and is necessary to ensure that parties may fairly have the opportunity to “resolve disputes over any new agreement language arising from differing interpretations of our rules.”<sup>14</sup> Because SBC has a very different opinion than the Coalition of the impact of *USTA II*, a deliberative amendment process subject to

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<sup>13</sup> *Triennial Review Order* at ¶ 701.

<sup>14</sup> *Triennial Review Order* at ¶¶ 700-701.

regulatory oversight is necessary to assure that the Congressional purpose of the 1996 Act is effectuated and the public interest is protected.

With June 15<sup>th</sup> quickly approaching, state commissions have started to respond to assure stability for competitors and consumers. The Rhode Island PUC committed to “maintain the status quo in Rhode Island regarding UNEs,” and ruled that Verizon “is required to continue to provision Rhode Island’s existing UNEs currently priced at existing TELRIC rates until it receives permission to terminate this obligation for a specific network element from this Commission.”<sup>15</sup> The state commissions in Connecticut<sup>16</sup> and Washington<sup>17</sup> ordered similar relief. Meanwhile, other states are poised to act. In New York, Chairman Flynn declared that the Commission would act to “to preserve the stability of New York’s telecommunications market until there is greater legal certainty,”<sup>18</sup> while on May 14<sup>th</sup> New Jersey BPU Commissioner Hughes issued an order requesting public comments and explained that, “It is important for this Board to ensure that telecommunications services to CLEC customers are not unduly disrupted if and when the D.C. Circuit’s mandate becomes effective.”<sup>19</sup> In Ohio, the Commission has

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<sup>15</sup> *In re Implementation of the FCC’s Triennial Review Order and Review of Verizon Rhode Island’s TELRIC Filings*, Docket Nos. 3550 and 2681, Order No. 17990 (Rhode Island Public Utilities Commission, March 26, 2004) at 7-8.

<sup>16</sup> *DPUC Investigation Into The Southern New England Telephone Company Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund in Light of the Telecommunications Act of 1996 – Reopener*, Docket No. 96-09-22, et al., Draft Decision (Connecticut Department of Public Utility Control, May 20, 2004). The Commissioners adopted this Draft Decision on June 2, 2004.

<sup>17</sup> *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc.*, Docket No. UT-043013, Order No. 4 (Wash. Util. and Transp. Comm., May 21, 2004).

<sup>18</sup> *Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271*, Case No. 04-C-0420, Public Notice at 1 (N.Y. Public Serv. Comm., March 29, 2004).

<sup>19</sup> *Implementation of the Federal Communications Commission’s Triennial Review Order*, Docket No. TO-03090705, Request for Comments (N.J. Board of Public Utilities, May 14, 2004).

similarly requested public comments relating “to the going-forward obligations of ILECs to provide UNEs to CLECs under both existing federal and state requirements, as well as the role of the Commission relative to implementing these obligations.”<sup>20</sup>

The Commission must similarly act expeditiously if it is to protect the interests of its citizens. SBC cannot lawfully alter its terms and rates for provisioning UNEs without amending its interconnection agreements and state UNE tariffs through the lawful process. If the proposed changes were disputed, the Commission would be required to determine whether SBC must continue to offer UNEs at TELRIC under the *SBC/Ameritech Merger Conditions*, Section 251 of the Act, and state law. As the Coalition demonstrates below, the answer to that question would be yes. But the Commission need not answer this question now; it only need preserve the *status quo* until the regulatory process runs its normal course to resolve these issues in a manner that provides stability, protects consumers, and affords due process to all parties. The Commission therefore can and should grant this Petition by requiring SBC to continue to provide unbundled loops, transport and switching on existing rates and terms until interconnection agreement amendments that alter such obligation are approved pursuant to Section 252.

#### **IV. APPLICABLE LAW REQUIRES CONTINUED UNBUNDLING OF TRANSPORT, LOOPS AND SWITCHING.**

As noted above, the Commission need not determine the ultimate impact of *USTA II* because such a determination, prior to the Section 252 negotiation process, would be premature. At this time, the Commission need only order a preservation of the *status quo* that would last long enough for the lawful process for amending the parties’ contracts to run its course. For

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<sup>20</sup> *In re the Implementation of the Federal Communications Commission’s Triennial Review Regarding Local Circuit Switching in the Mass Market*, Case No. 03-2040-TP-COI, Entry (Public Utilities Comm’n of Ohio, May 27, 2004).

illustrative purposes, the Coalition has attached hereto as Exhibit 1 its position statement that under applicable law SBC would still be obligated to provide UNEs under Section 13-801 of the Illinois Public Utilities Act,<sup>21</sup> the *SBC/Ameritech Merger Conditions*, and Section 251. While the Commission need not rule on these issues at this time, the Coalition's attached statement demonstrates at a minimum that there are substantial questions that must be addressed before regulators could authorize SBC to discontinue or alter their provision of loops, transport or switching. It is vitally important that these issues be addressed by regulators through the contract amendment process, and not by SBC unilaterally.

## **V. CONCLUSION**

Grant of this Complaint on an expedited basis prior to June 15 is warranted to provide certainty to the market and consumers that service will not be unilaterally and unlawfully disrupted in the event that *USTA II* takes effect. The Commission should therefore clarify that SBC remains obligated to provide unbundled loops, transport, and switching network elements on existing rates and terms unless and until amendments to SBC's interconnection agreements and Illinois UNE tariff that alter such obligation are approved by the Commission.

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<sup>21</sup> 220 ILCS 5/13-801.

Respectfully submitted,

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